No. 410.

Brf. of Dillon for D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

No. 410.

LOUIS JACOBS,
Plaintiff in Error,

vs.

DORA MARKS,
Defendant in Error.

Writ of Error to the Supreme Court of Illinois.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

JOHN F. DILLON,
Attorney for Defendant in Error.

ANDREW J. HIRSCHL,
JOHN W. BYAM,
Of Counsel.

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BRIEF.

The matters rest so greatly on a review of facts that it is difficult to brief them properly—to do so would simply restate the argument.

The facts are reviewed.

The pleadings and the record are reviewed.

The litigation in Michigan, and later in Illinois involved different subject-matters and were against different defendants.

Plaintiff in error waived and abandoned in the state courts his present contentions.

North Chicago, etc., Co. v. *Wrixon,* 150 Ill., 532.

The decision of the State Supreme Court, not resting on a Federal question, can not be here reviewed.

Seeberger v. *McCormick*, 20 S. C. R., 128

175 U.S. 274

The Furniture Company was never released by defendant in error.

The Company and Jacobs were not *joint tort feasors*.

The Supreme Court of Illinois does *not* take judicial notice of the statutes or law of Michigan. (Nor can this court on writ of error in this case.)

Miller v. *Wilson*, 146 Ill., 528.
Dearlove v. *Edwards*, 166 Ill., 621.
Hakes v. *Bank*, 164 Ill., 275.
Huntington v. *Attrill*, 146 U. S., 657.

Review of citations in opposing brief.

A dismissal, though reciting that it is by agreement, is not a bar to a subsequent suit.

Haldeman v. *U. S.*, 91 U. S., 585, 586.

Nor is a decree when entered by consent.

Gay v. *Wadhams*, 73 Ill., 415.
Lawrence v. *Janesville*, 138 U. S., 552.

A judgment on a different subject-matter can not be used as a bar.

Kitson v. *Farwell*, 132 Ill., 327.

The prayer for a directed verdict must be by "*written*" instruction.

W. C. S. R. Co. v. *Foster*, 175 Ill., 396, 398.

The jury may ignore an erroneous instruction.

McNulta v. *Ensch*, 134 Ill., 46.
W. C., etc., Co. v. *Maney*, 170 Ill., 422.

Whether one party has been released by a release exe-

cuted to another or satisfaction received from another, is always a question of fact, to be determined by the jury from all the circumstances, and should be submitted to the jury.

Cooley on Torts, page *139.
Robinson v. *Stow*, 39 Ill., 568, 572.
City v. *Babcock*, 143 Ill., 358.
Parmelle v. *Lawrence*, 44 Ill., 405, particularly page 410.
Moore v. *Stanwood*, 98 Ill., 605, especially 628.
Thomason v. *Clarke*, 31 Ill. App., 404, p. 407.
Lumberman v. *Preble*, 50 Ill., 332; please read opinion in full.

A discontinuance does not bar a subsequent action for the same cause.

Am. and Eng. Enc. of Law, page 667, and cases cited.
See *Haldeman* v. *United States*, 91 U. S., 584.
Black on Judgments, Vol. 2, Par. 701.

The question whether a given thing has been received in satisfaction in the absence of an express agreement in so many words, is a question of fact.

Hart v. *Boller*, 15 Sargent & Rawle, 162.

An accord without satisfaction does not limit the recovery by the creditor to the amount agreed upon by the accord, but he may sue on the original claim.

Campbell v. *Hurd*, 26 N. Y. Supplement, 458.
Simmons v. *Clark*, 56 Ill., 96.

The accord must be actually and fully executed to form a defence.

Frost v. *Johnson*, 8 Ohio, at p. 395.

Smith v. *Cranford*, 32 N. Y. Supplement, at p. 377, affirmed 49 N. E. R., 1104.

Simmons v. *Clark*, 56 Ill., 96.

Citations of opposing counsel reviewed.

JOHN F. DILLON,
Attorney for Defendant in Error.

ANDREW J. HIRSCHL,
JOHN W. BYAM,
Of Counsel.

ARGUMENT.

May it please the Court:

The questions involved herein are few and simple. The contention is essentially as follows: The defendant in error (hereinafter referred to as Mrs. Marks) was induced by plaintiff in error (hereinafter referred to as Jacobs) to deliver to him $5,000, with which he was to obtain for her $20,000 of the stock of the Chicago Furniture and Lumber Company, a corporation, which expected to operate, or was operating, in Delta County, Michigan, and to which hereinafter for the sake of brevity we will refer as the Company.

These transactions, that is, the obtaining by Jacobs of Mrs. Marks' money, and the obtaining by her of said stock in said Company, occurred in 1893, and became consummated at some time in August of that year.

Mrs. Marks, on December 4, 1893, considering that she was entitled to have the money refunded to her (less $1,000 which in the meantime had been returned to her), brought a suit against the Company in Michigan (Circuit Court of

Delta County), and obtained an attachment there against the Company.

This suit remained in court until July, 1894.

July 14, 1894, Mrs. Marks and the Company entered into an agreement in writing, which is set forth on pages 2 to 5 of brief of plaintiff in error.

By this agreement—which was purely "*executory*"—by this executory agreement the Company was to do the following things:

First. To pay Mrs. Marks $1,000 "*as soon as*" the Company *would dispose* of its stock *to the amount* of $1,000.

Second. The Company was to pay $3,000 to Mrs. Marks *on the day* that it *would* obtain possession of, and a clear title to, its plant in Michigan.

Third. The Company to discontinue its damage suit then pending against Mrs. Marks.

Fourth. The Company further agrees to release Mrs. Marks from all liability for the balance due on unpaid stock.

Thus far are the undertakings of the Company.

Now come the undertakings of Mrs. Marks.

She on her part agrees to sell her $20,000 of stock to the Company and accept payment as aforesaid, and further to discontinue her attachment suit.

Pursuant to this arrangement there was entered in said court in Michigan, on July 25, 1894, the following order: "This cause having been settled, it is hereby discontinued "by consent of both parties without cost to either party."

In 1897 Mrs. Marks sued Jacobs in the Circuit Court of Cook County, Illinois (Chicago), in an action on the case, asserting that he had deceived her by false representations,

and thereby obtained from her the $4,000, which he had put into the Company.

In this suit Jacobs pleaded *not* guilty.

And *pleaded specially* that Mrs. Marks had sued the Company in Michigan, and in that suit the entry of the case being settled and discontinued was made, and that *so* the "plaintiff *has received satisfaction.*"

Another special plea set up the same facts as to the Michigan litigation, and that an attachment had been issued therein, and a settlement made and the suit discontinued and "*so* plaintiff has *received satisfaction.*"

The plaintiff replied to these special pleas to the effect that the cause of action in her declaration (in Cook County against Jacobs) is "*not the same claim*" as that sued on by said plaintiff in said cause in the Circuit Court of Delta County, Michigan.

There was no rejoinder to this *replication,* nor was the same attacked by demurrer or in any manner, but so far as the records show *stands confessed.*

The cause proceeded to trial, the jury found Jacobs guilty, and assessed the damages at $4,000.

Jacobs appealed to the Appellate Court of Illinois, wherein, with an opinion by Judge Freeman, the decision was reversed, but *later,* on a rehearing, the *decision was affirmed.*

Jacobs then appealed to the Supreme Court of Illinois, which in turn affirmed the Appellate Court, and now Jacobs brings the cause here upon a writ of error.

The *two opinions* of the Appellate Court and the opinion of the Supreme Court of Illinois are attached to the brief of Jacobs here.

It was the contention of Jacobs in the trial in Chicago

(Circuit Court of Cook County, Illinois), that Mrs. Marks did in the Michigan litigation *release* the Company, and that thereby she *released* Jacobs.

On this he invokes the highly technical doctrine that the release of one *joint tort feasor* releases the others.

This contention Jacobs made by asking an instruction to the jury, which was refused, and hence he claimed in the Appellate and Supreme Courts of Illinois, and now complains here, that the trial court and reviewing courts of Illinois have not given full faith and credit, etc., to the Michigan judgment.

And on that he bases his present prayer for reversal.

To this contention there are several answers, as shall presently be discussed.

To summarize them in advance we may say, first that Mrs. Marks has *never released* the Company; secondly, that even if she did, the Company was not a *joint tort feasor* with Jacobs; third, that the point has been waived on this record; fourth, that the opinions of the State courts are broad enough to sustain themselves on other grounds regardless of these matters, and hence that a Federal question is here not necessarily or at all involved.

These four propositions we will now consider, but not exactly in their order.

It will be apparent at the outset that the evidence in the trial court, covering some three hundred pages of typewritten transcript, has not all been brought into the printed record spread before your Honors. Nor could it be. Only that which relates to the supposed Federal question would be proper here. All that which relates to the case on its merits as to whether the fraud was actually perpetrated, etc., does not belong here. On all such matters the State courts are the final arbiters.

Be the State court right or wrong. your Honors sit not here to review them on matters such as these.

It will also be borne in mind that the special pleas, which had reference to the Michigan litigation, alleged the *settlement* thereof, and that Mrs. Marks had *received satisfaction.*

The *replication* alleged that the *subject-matter* was "*not* "*the same claim.*"

This replication stands confessed; but supposing that it was deemed as traversed (although not actually so) by the cause proceeding to trial, then all the evidence either to support the *plea* that the plaintiff had "*received satisfaction,*" or, to support the replication, namely, that "*it is not the* "*same claim,*" would be evidence upon issues purely within the exclusive and final jurisdiction of the state tribunal, and would present simply a question of fact, and one not subject to review by your Honors, no matter how erroneously the state tribunal might act.

So also the replication to which we have alluded either stands confessed for want of a rejoinder that the claim sued on in Chicago is not the same claim as the one sued on in Michigan, or else if not confessed it stands proved to the satisfaction of the state tribunals, the final arbiters of that question. No pretense is made in the printed book before your Honors to set up *either all* or *any of the evidence* which on these propositions was spread before the state tribunals; nor would such evidence be here appropriate.

Jacobs can not bring it here because it relates purely to matters of State court concern.

Surely in the few pages which he devotes to the evidence he does not pretend to bring it, nor on our part do we.

Supposing the State Supreme Court erred in finding not

proved Jacobs' plea that the plaintiff had "received satis-
"faction."

That would be an error not subject to review here. Supposing the State Supreme Court erred in finding as proved the replication that the claim sued on in Chicago was not the same claim as the one sued on in Michigan; such error would not be subject to review here.

We do not bring into the record here the evidence underlying these findings to demonstrate that the findings are correct, we rely upon the fact and the law that even if these findings are not correct and the record should so show, your Honors would be beyond jurisdiction to reverse as you are not here as a reviewing tribunal in these matters over the State court.

But so far from these findings being erroneous or from our bringing evidence in to support them and prove they are correct, we can assert here confidently that they are not erroneous, and that even the fragmentary evidence which has been spread before your Honors absolutely proves their correctness.

It is shown on the face of the record as printed here that plaintiff in fact never received satisfaction for her $4,000, or any part thereof, and further it is shown that the claim sued on in Chicago is not the "same claim as that sued "on by plaintiff" in Michigan.

This replication therefore standing, as we say, either confessed, would end counsel's contention, or if this replication be deemed traversed then this evidence would end counsel's contention.

We say the meager evidence in the record proves beyond question that the claim sued on in Chicago is not the same claim as that sued on in Michigan.

It requires no great logical analysis to understand the word "claim." Its leading and primary definition, and one generally understood, is found in Anderson's Dictionary of Law as "a demand of some matter as of right made of one "person upon another," thus clearly it resolves itself into three elements, namely, the subject-matter, the person demanding, and the person from whom demanded.

Or we may say the *res,* the demandor, and the demandee.

To be therefor the same claim these three elements must be the same. Now, in the Michigan litigation there was the same demandor as in the Chicago suit, namely, Mrs. Marks, plaintiff in each. But in Michigan the demandee was the Company, whereas in Chicago it is Jacobs. Thus a fatal failure of identity in that respect. In other words, a claim which we may make upon Doe is certainly not the same claim with a demand which we make upon Roe.

And this is true even if the *res* should be the same. A single illustration will suffice: The clerk in a store sells a bushel of apples under the belief that he has sold them to Doe. The store-keeper sues Doe, and on the trial Doe proves an *alibi* and judgment results in his favor; but evidence is shown from which it is learned that another person, in the same community, namely, Roe, resembles Doe so greatly as at times to deceive. Thereupon the store-keeper sues Roe.

Now, if these are the same claims it would follow that the first judgment would be a bar to the next suit.

Clearly they are not the same claims. Clearly the judgment is not a bar to the second suit.

There, at least, you have two elements the same, the *res* and the demandor, that is, the bushel of apples and the store-keeper. But in the case at bar, may it please the Court, we have not even the same *res.*

This court has held that there must be identity of the subject demanded, also of the *cause* of demand, and of the *parties* and even of the *character* in which they act.

Packet Co. v. *Sickels*, 24 How., 331-341.

The evidence in the record, though meager, does contain, however, the declaration of Mrs. Marks in the Michigan case. Clearly from this declaration can be learned the nature of her "claim."

If there is any step in a litigation which shows what the subject-matter is, it must be the declaration. We have not before us the printed record laid before your Honors, as it has not yet been prepared, and hence we are not able to point to the particular page and line, but your Honors will find therein the Michigan proceedings and the same will set forth the declaration filed by Mrs. Marks in Michigan.

It will be found corresponding to the original transcript, pages 186-187.

We are unable to say that the declaration will appear in full in the printed book. If it does not appear at all, then every presumption must be indulged in favor of the correctness of the acts of the Illinois Supreme Court.

If plaintiff in error here fails to bring that Michigan declaration to the attention of your Honors in having it printed in the record, then you must on familiar principles infer that it was such as justified the Illinois court in its decision.

If, however, said declaration has been printed into the abstract, and the same is now in the presence of your Honors, you will find that it is a declaration in *assumpsit*. Mrs. Marks complains of the Furniture Company "of a plea of "trespass on the case upon promises," and then follow "*the* "*common counts.*" In other words, the Michigan declara-

tion is *simple* and *solely* an assumpsit on the common counts. It lays the amount of the "goods sold" at $7,000, and lays the damages at $7,000.

Now, consider the declaration and the suit in Chicago. It is in "case." And alleges the obtaining by Jacobs through false representations of plaintiff's money to be invested in the Furniture Company, the plaintiff to become a stockholder.

It would be an imputation upon the intelligence of this court for us to attempt to further demonstrate what is so readily apparent, that the *res* or subject-matter involved in the claim in Chicago was something entirely different from that involved in Michigan.

Had Mrs. Marks actually tried this assumpsit suit against the Company and lost it, it would have been no bar to an action in "case" for false representations.

Or had she tried in this assumpsit to prove the fraud in question, she would not have been allowed so to do.

It follows, therefor, not only that no Federal question is involved, but also that the state tribunals decided correctly in sustaining the replication on the basis that the claim before the court in Chicago was not the same claim as that which had been before the court in Michigan.

There was the same demandor, but not the same demandee, nor the same subject of demand.

Even if it be supposed that the State Supreme Court erred with reference to some of the matters above discussed, and that your Honors have jurisdiction to review such error, then an opportunity should first have been given to the said court to correct its error, *if such opportunity has not* been given then such error *is deemed waived.*

It is an elementary rule that a court of review will not

consider an alleged error, which was not brought to the attention of the subordinate court, for had it so been, that court would have had an opportunity of correcting such error.

The matter of which counsel now complains, even if it be an error on the part of the Supreme Court of Illinois, could and should have been presented to that court, and it should have been requested to review itself in that record and correct such error. The appropriate way to accomplish this would be by a *petition for a rehearing.*

Counsel did indeed file such petition, and we propose now to bring to the attention of your Honors precisely what said petition contained.

We file this present brief at an early date in order to give opposing counsel time in which to reply.

And they will in their reply *not deny* that we are now setting forth correctly their petition for rehearing.

Should they make such denial we will then cause to be certified before your Honors by the Clerk of the Supreme Court of Illinois, a copy of such petition, as that will be the only practical way to demonstrate the correctness of our present assertion, and it is a method which is recognized under similar circumstances.

North Chicago Railroad Co. v. *Wrixon,* 150 Ill., pages 532-534.

But we say that they will not deny it, and we now follow with their entire petition for rehearing.

The first paragraph of said petition takes up an alleged irregularity in the issuance of the attachment writ. The second paragraph takes up the insufficiency of the declaration. The third and fourth paragraphs we give in *haec verba.*

"*Third.* The court in its opinion held, on the plea of satisfaction, that as defendant in error did not actually receive the amount involved herein, there was no satisfaction. This finding was made by the court upon oral evidence, in contradiction of the Michigan judgment, which imports absolute verity, and such evidence was entirely immaterial and incompetent.

"*Fourth.* We furthermore submit that Article 4 of the Constitution of the United States requiring that full faith and credit be given to the judicial records of another state, required that the record of the Michigan judgment be accepted as conclusive of the fact therein recited, to wit, that the cause had been settled, and the oral evidence tending to show that there was no satisfaction was incompetent. And that this provision of the Federal Constitution, although not considered in the former opinion of the court, is a question fairly arising in this cause, and should now be considered herein.

"Upon these grounds, we respectfully pray for a rehearing."

(Signature of counsel follows.)

We have thus given *in its entirety* the petition for rehearing.

It will be observed that the *third* paragraph of the rehearing petition complains that the court finds that Mrs. Marks did not actually receive satisfaction.

And the *fourth* paragraph that oral evidence tending to show there was no satisfaction was incompetent.

These are the only pertinent matters set forth in the petition for rehearing.

Now, turning to the opinion of the State Supreme Court, it will be seen, near the end of the opinion, that a "*written* "*contract*" was in evidence, and that "from that contract "*and other evidence*" it appears that the Company *never complied* with the contract, and the plaintiff *never recov-*

ered a single dollar *towards satisfaction.* Or, in other words, the Supreme Court of Illinois is influenced in its result by the contract and the "*other evidence.*"

What was that other evidence? Is it reproduced in the printed records now before your Honors? Is there any attempt made so to do? And even if it were, would your Honors have the jurisdiction to review it? and say that the Supreme Court of Illinois *erred* in reaching the conclusion which it did upon said *other evidence.*

Suppose that the Supreme Court of Illinois erred in any way either as to the weight, probability, effect or intendment of such other evidence. Could your Honors reverse for that reason? We think you are without jurisdiction so to do.

You certainly would not so do where even if this be an error it was not called to the attention of that court in the petition for a rehearing.

Counsel now have much complaint and also had some complaint in the petition for rehearing that the *oral evidence* tending to show *lack of* satisfaction was *not competent.*

Here, again, we will say that the matter is not covered in the presentation of the case in the State Supreme Court.

In the *printed abstract* in that court the only allusion to this subject is found at the bottom of printed page 74, in which Mrs. Marks, being then in rebuttal and having been recalled, testifies "about the dismissal of that suit against "the Chicago Furniture & Lumber Company there was a "writing. That is the writing." Said paper offered in evidence by plaintiff, marked "Exhibit 11." (Then follows the paper in *haec verba* the same as Jacobs' counsel here have given it on pages 2 and 3 of their brief.) Then, resuming her narrative, Mrs. Marks says:

"The president of that Company never carried out his

contract on the part of the corporation; he said that he would not give me anything; that the stock was not worth anything, and he said he would not give me a cent for the stock. I called upon him about July or August, 1894."

We have above set forth absolutely *all* that appears in the printed abstract in the State Supreme Court with reference to this topic.

It will be seen that *no objection* is presented whatsoever to her testimony. It will therefore be seen that if the trial court committed any error in accepting her oral testimony, that error was waived because not set forth in the printed abstract in the Supreme Court and, being waived there, it must be deemed waived here.

If the State Supreme Court properly ignored that error, because of failure to perserve it in the printed abstract, then the State Supreme Court decided correctly, and your Honors have no reason to reverse it.

We say with reference to the abstract in the State Supreme Court that we have above correctly rehearsed it, and if opposing counsel in their reply brief deny that we have so done, we will again proceed as above indicated, and we will cause one of the printed abstracts to be certified up by the Clerk of the Supreme Court in proof of our assertion—that being the only practical way to accomplish such results, and the precedent being that way, see again—

North Chicago Railroad Co. v. *Wrixon, supra.*

We have thus shown that the opinion of the Supreme Court is broad enough to decide this case, without reference to any Federal question, and when there is such breadth then your Honors have no jurisdiction to entertain such a question. See citations at end of opinion in

Seeberger v. *McCormick* (Dec. 4, 1899), 20 S. C. R., 128.

175 U.S. 274

To restate this ground we say briefly that defendant's special plea that plaintiff had *received satisfaction for this same injury* was found, and most properly so, against him; that plaintiff's replications that the *claim was a different one* was found, and most properly, so to be fully proved; that defendant's contention now that oral evidence of satisfaction is not admissible in the face of the Michigan judgment has been waived, not being presented to the State Supreme Court; that said Supreme Court's decision upon the "other evidence" that the contract of settlement had not been complied with can not be here reviewed, because the review of said "other evidence" was not brought to the attention of the State Supreme Court in the petition for a rehearing, and that court was given no opportunity to correct itself if indeed it was in error with regard to such "other evidence."

As above indicated, Jacobs contends here that the Michigan judgment released the Company, and hence released him, because of the principle that the release of one *joint tort feasor* does release the other.

To this we now say, first, that the Company was never released and, second, even if it were it was not a "*joint tort feasor*" with Jacobs. Nor did Mrs. Marks ever claim or assert that the Company was a *joint tort feasor* with Jacobs.

We have said that the Company was never released. The Michigan record shows that the matter had been "settled" and the case is discontinued.

The Illinois record shows that the agreement of settlement has not been complied with. It so shows without presenting any error there over which your Honors have any jurisdiction even if any error exist as we have above discussed. If, then, it be true that the Michigan agreement of

settlement has not been complied with, it follows that Mrs. Marks is *at liberty to-day* to sue the Company in *precisely* the same manner *that she sued it before.*

True it is, that if the Michigan record would show a judgment in favor of the defendant, and Mrs. Marks should now sue that same defendant (the Company), then said Company could plead said judgment in bar and properly so.

But there is *no judgment* in favor of the Company, and hence nothing which it can plead in bar.

There is only a discontinuance. It has never been held that a discontinuance of the first suit is a bar to the second suit. But counsel say this is more than a discontinuance, they say that the Michigan record recites the fact that the cause has "been settled."

But this is only a "recital" and not a judgment.

Nor does the recital indicate *how* it has been settled.

It may have been settled on sundry *conditions precedent.* If such conditions afterwards do not occur, then, of course, *the settlement does not become efficacious.*

If, therefore, in later years Mrs. Marks again sues the Company and the Company would plead "discontinuance" of the first suit, Mrs. Marks would show that a mere discontinuance does not bar a second suit; and if, on the other hand, the Company should plead a prior settlement Mrs. Marks would reply that the settlement had never been carried into effect; and yet again, if the Company should plead the prior judgment of a court stating that the parties had settled, Mrs. Marks could again reply that the prior judgment so stating, *while correct enough at the time it was entered,* yet in *later sequence* became displaced by reason of such *settlement failing.*

All this could properly be done *without violating* the principle that *judgments shall not be collaterally assailed.*

Now, if all this can be done in a litigation which we are supposing to take place in the future between Mrs. Marks and the Company, much more can it be done in a litigation which is not even against the Company at all, but against a *third person* altogether.

And such in fact has happened in the case at bar. And having so happened, it fails to present a "Federal question." The full faith and credit to which a Michigan court record is entitled has been given it, it was fully considered by the Supreme Court of Illinois, and that court was bound to come to its decision in accordance with the prior practices and decisions in Illinois.

True it is that the Michigan record is entitled in Illinois to the full faith and credit to which it would be entitled in Michigan. That is to say, that the record is entitled to the faith and credit which pertains to it in the state in which it is made originally.

But when the case is tried in Illinois the courts of Illinois will presume the decisions of Michigan to be the same as are the decisions in Illinois, unless the contrary be proved.

Herein the rule as to judicial notice *differs.*

The Federal courts *will* take judicial notice of the *laws and decisions* of *each* of the states, but such is *not* the case with the State courts.

With some exceptions each *State court requires proof of the laws and decisions of another state.*

In *Miller* v. *Wilson,* 146 Ill., 528, it is held that the Supreme Court of Illinois will presume the law of another state to be the same as it is in Illinois, *unless the contrary be proved;* and see bottom of page 531, there was no proof

what the "statute *or law* of Kansas was." See also *Dearlove* v. *Edwards*, 166 Ill., 621; *Hakes* v. *Bank*, 164 Ill., 275, and cases cited.

The record in the case at bar fails to show that the law of Michigan was brought into the evidence in the trial in Chicago.

Under these circumstances, and foregoing citations, the Illinois courts must presume *that the decisions in Michigan are the same as those in Illinois.*

The Supreme Court of Illinois has therefore followed *its own prior views* in deciding this case.

What these views are, and what the prior decisions in Illinois are, we shall see presently.

If the Supreme Court of Illinois has decided correctly because of the *absence of evidence* to the contrary, then your Honors can not say that it erred, although you in turn might perhaps have before you decisions from Michigan which might tend to show a result different from that reached by the Supreme Court of Illinois.

This court, in *Huntington* v. *Attrill* (146 U. S., 657), in the majority opinion recognizes this principle and admits that the law of New York should have been *proved as a fact* in the Maryland courts, and not having been so done, then your Honors can not take judicial notice of it on a writ of error to the Maryland court. (18 S. C. R., page 232.)

But we will show eventually that not even from the Michigan decisions, nor yet from that great expounder of the same, Judge Cooley, is the result of the Illinois Court erroneous.

We have said that Mrs. Marks could to-day sue the Company, and the prior Michigan record would be no bar.

To this counsel say that it would be a bar.

Not because of the "discontinuance" therein set forth, but because it is therein said that the cause "has been "settled," and they cite

U. S. v. *Parker*, 120 U. S., 96.

That case, however, was entirely different from the case at bar.

The first suit was upon the bond of an Indian Agent.

The *defense* was a denial of liability, and that the defendant had *adjusted* his accounts in Washington, and been "discharged." On the trial the defendant introduced evidence to this effect, and thereupon the record shows that the court does, with the consent of the Government attorney, find that "the subject-matter in this suit has been *adjusted* and settled "by the proper parties in Washington. It is therefore "ordered that the case be, and the same is, hereby dis-"missed."

Thereafter the Government again sued the very same defendant upon the same bond.

And it was held that the first judgment is a bar. The opinion proceeds *strongly* on the basis that the *proceedings and proofs actually* had in court and the recital in the judgment indicated that the judgment of dismissal was rendered "*on the merits*" and "because the *defense* of the defendant "was *found* to be sufficient in law and *true* in fact."

Thus the case differs from the case at bar, in which the record shows just the opposite: No evidence introduced, no proceedings after issue joined and merely a recital that the matter had been settled.

In this *Parker* case there is language in the opinion, we may admit, capable of the construction put upon it by our opponents, but the same is *obiter* and not borne out by the citations on which it rests; that is to say, it is not borne

out sufficiently to apply it to the circumstances of the case at bar. One of these citations is

Bank v. *Hopkins*, 2 Dana, 395,

in which the Kentucky court says that an entry of "dismissed agreed" is a bar to a future litigation.

The opinion, however, in that case clearly shows that the plaintiff failed *to reply to the special plea, alleging* such dismissal and *agreement.*

Now, suppose that plaintiff had replied (as she actually did in the case at bar), that is, suppose said Kentucky plaintiff had replied showing that the cause settled was *not the same* as the *next cause sued on* and again had *replied* showing that the defendant's *special* plea of *satisfaction* was *not true,* because, *in fact, there had been no satisfaction.*

Under these circumstances the court would have been called upon to rule upon the admissibility of evidence under such replication. There being no replication in the Kentucky case what the court there says as to whether evidence would have been heard, was not involved in that litigation.

The other citation is *Merit* v. *Cambell,* 47 Cal., 542. Here, also, there was no replication nor any evidence offered.

In neither of these two cases was any evidence offered.

Hence the assertion by your Honors in the *Parker* case, taken from *these* two cases, that anything to *overcome the dismissal* must be included in the "agreement *and* in the "judgment" is *uncalled* for.

Nor is it a well considered assertion.

To say that such matter must be included in the "agree-"ment *and* in the judgment" is not reasonable.

Evidently the word "and" between the words agreement and judgment should be "or."

Had the court acted advisedly it would no doubt have said that matter in the agreement "or" judgment will suffice, etc., for clearly *if* matter is *in the judgment* it does *not* have to be in the agreement. Hence we say that the expression was ill-advised.

As the judgment always, at least *prima facie*, portrays all prior agreements.

Further, we say that if matter was in the agreement it does not have to be in the judgment, provided such matter be made applicable by proper replication.

On *this* proposition *this court* is on record to *the fullest extent:* In

Haldman v. *U. S.*, 91 U. S., 585,

your Honors held *bad* on demurrer *former pleas*, which showed a dismissal.

And especially, on page 586, your Honors deal with a former dismissal, which was by *agreement* being thus "*dismissed agreed.*"

Your Honors say that *regardless* of the effect given by the courts of Kentucky to such an entry it does *not* in your opinion "*import an agreement to terminate the controversy.*"

You further say, and we ask you to read the entire page 586 of that report, that a dismissal even with the recital that the matters were agreed on, *imports an intention to preserve* the claim and the *right* to a *new suit* "if it becomes neces-"sary."

We have above indicated that the Supreme Court of Illinois has in the case at bar followed its own prior decisions; that no evidence was given of the Michigan decisions; that it is a settled law of Illinois that its courts do not take judicial notice of the decisions or law of the other states.

If, then, our court has so done in this case, and has correctly decided the cause, your Honors cannot reverse it even if you *do* take judicial notice of the Michigan decisions.

Nor if you consider that our court has erred can you reverse it, as it is an error on topics relating to general law, as was the case in *Abbott* v. *The Bank*, 175 U. S., 109.

All of counsel's citations excepting those by us above reviewed present instances in which it can clearly be seen that the judgment was final and upon the merits, and do not present any such instance as is in question here.

Their citation

Hubbell v. *U .S.*, 171 U. S., 209,

does, it is true, use the word "dismiss."

But that was a *petition* before the "Court of Claims," and hence the word dismissal is not only an appropriate, but the *only word* which can be used under such circumstances.

You could not very well enter judgment in favor of the defendant or judgment against the petitioner as you would in an assumpsit suit.

The finality of a *petition* is its dismissal.

Moreover, the reading of that case will indicate that the *merits* were offered and fully considered.

The Supreme Court of Illinois, in the case at bar, most properly in the absence of any proof of the Michigan law on the subject, did, as we say, but follow its own prior rulings.

Gay v. *Wadhams*, 73 Ill., 415,

is to the effect that a consent decree does not constitute *res adjudicata*.

Principle of this case is fully approved in *Lawrence* v. *Janesville*, 138 U. S., 552, and cases cited therein. There

is language in this case of *Gay* v. *Wadhams* broad enough to make it applicable to law as well as chancery. The case has frequently been followed and is the settled law of the jurisdiction. (See also 161 Ill., 600.) It is not *res adjudicata*, because the court has not exercised judicial functions—there was no argument, no consideration, no contest. The court simply exercised an "administrative function" "by entering the agreement of the parties." Such language was used with regard to a formal decree and is of course still more apt concerning a "mere discontinuance."

Counsel's formidable array of decisions are little to the point; each case must depend upon its own circumstances.

In very few of those cited did your Honors reverse the State court, and when you so did the record clearly shows that the case turned and turned entirely upon the foreign judgment, and that it was an absolute judgment upon the merits awarding some definite recovery and such definite recovery of course had to be respected in every jurisdiction.

Nothing of the sort exists in the case at bar. Mrs. Marks sues Jacobs in Chicago. He asserts that he was released because she had sued the Company in Michigan and settled and discontinued that suit.

The court in Chicago admitted the evidence of the Michigan proceedings, gave them full consideration and decided that they were not a bar to the Chicago suit.

Nor could they be.

Here, again, the Illinois courts do not take notice of the laws or decisions of Michigan, because not proved in evidence; that they so refuse is the settled law of Illinois as by us above quoted.

Consequently in the absence of other proof the Illinois courts will follow the Illinois decisions and their so doing

can not constitute error; although were the case to be heard in the first instance before your Honors you would take judicial notice of the Michigan decisions and might perhaps come to a different result. Although we shall show presently that even under the Michigan decisions you would reach the same result as did the Illinois court.

It is the settled law of Illinois, see

Kitson v. *Farwell*, 132 Ill., 327,

that a judgment must be upon the same subject-matter and between the same parties to be a bar, and that even if between the same parties yet if on a different subject-matter it would not be a *bar*, but may be used in evidence by way of estoppel.

The Michigan record involved here is not a judgment at all, nor is it the same subject-matter, nor yet between the same parties; hence properly is not a bar in Illinois, nor an estoppel in evidence.

Should your Honors see fit to consider the Michigan cases you will find that they bear out our assertions concerning them. Thus, counsel cite *Jacobson* v. *Miller*, 41 Mich., 98 (1 N. W. R., 1013), which, however, fully sustains us. The opinion by Judge Cooley recites judgment for an installment of rent upon a lease; and yet, in a later suit on the same lease for a later installment, the same defendant was allowed to dispute the execution of the lease (in the earlier suit he had not put the execution in issue), the court holds that the *subject-matter* in the two suits was *different*.

But conceding for the sake of the argument that it is a judgment, and that it is on the same subject-matter, it is still not between the same parties—in Michigan the Company was defendant, whereas in Chicago Jacobs is defendant —hence in the best event the Michigan record is but evidentiary as tending to prove the special pleas, namely, that

Mrs. Marks had in Michigan received *satisfaction,* and also as tending to disprove her replication, namely, that the claim in Chicago was different from the claim in Michigan.

Being thus evidentiary, the Illinois court gave it full effect by allowing it to be in evidence on these above propositions to the jury, and if the jury, after hearing, as the Supreme Court of Illinois says, the agreement and "other evi-"dence," saw fit to decide that she had not thus received satisfaction, and that the claim made in Chicago was not the same claim as the one made in Michigan, why it follows that your Honors are without jurisdiction to review this record.

This result found by the State courts, whether right or wrong, is not here for review, as it is reached upon common law principles of the effect to be given to the Michigan record in connection with the other evidence, and is reached after giving full faith and credit to the Michigan record for what it was worth.

Under the circumstances involved and in the state of the pleadings with the evidence in the record that there is (which, if objected to, yet the objection was waived, as we have shown by not bringing it before the State Supreme Court)—under these circumstances it can not be doubted that had the suit against the Company been in Illinois, as well as was the suit against Jacobs in Illinois, that the Supreme Court of Illinois would have reached precisely the same result as it has.

Nor can it be doubted that if the suit against Jacobs had been in Michigan as was there the suit against the Company, and had the pleadings and evidence been the same as they were in Illinois that then the Supreme Court of Michigan would have sustained a judgment against Jacobs (assuming that the state of law in Michigan is the same as

it is in Illinois). And such was the assumption which the Supreme Court of Illinois was compelled to indulge in, there being no proof to the contrary in the record.

These last positions well state the tests of these matters.

In counsel's several citations it is clearly seen from the record that had the second suit been in the same state in which the first suit was, that then the result would have been different from that which actually happened in the second suit!

Counsel cannot complain in the case at bar of the procedure in any of the courts. Their client received even more consideration than he was entitled to.

The record fails to show that at the conclusion of all the evidence in the trial court the defendant offered a written instruction to take the case from the jury. It is a settled law in Illinois that a *motion* to that effect is meaningless—there must be a "*written*" instruction.

W. C. S. R. Co. v. *Foster*, 175 Ill., 396, page 398.

In the absence of such a written instruction defendant can not claim here any error which seeks to review the entire record. The fact that later (as in the case at bar, defendant's instruction No. 20) a peremptory instruction is requested mixed in with a series of instructions, does not overcome the last point (p. 398).

Another complaint herein is as to his instructions No. 16 and 18.

Now, so far as concerns their subject-matter, they are erroneous in following respects: No. 16 *assumes* that the litigation in Michigan "was based upon the same cause of "action" as that in Chicago and "involved the same subject-matter."

This is erroneous, as hereinabove shown, that a suit

against one defendant is not the same subject-matter cause of action as a subsequent suit against an entirely different defendant.

It is true that Jacobs got $4,000 from Mrs. Marks and so did under false pretenses and invested these $4,000 in stock of a company, which stock was taken in her name.

This may be conceded, yet in one suit she sues the Company, and in the other suit she sues Jacobs, a very different matter. Suppose Jacobs, after receiving the $4,000, never actually turned it over to the Company, kept it all himself, retained the entire benefit of the transaction. In such case Jacobs would be liable to her either in "case" for his false representations or in assumpsit as having received the money for her use.

The Company could cancel her shares of stock as being unpaid for as Jacobs was her agent to make the payment for her and failed so to do. In such an event she would have no right of action whatever against the Company.

Assume, on the other hand, that Jacobs, after receiving the $4,000 from her, turns it all over to the Company, retains no benefit for himself. In such case he would not be liable to her in assumpsit, but he might still be liable to her in "case." And in such event, too, she might have an action against the Company not, however, in "case," but in assumpsit.

Her money having been obtained by false representations, she could on discovering the fact, rescind all her promises (so long as her money was not yet in the hands of innocent holders *for value*), and after such recision she could recover from any person in whose hands the money be although such person be entirely innocent in the transaction so long as such person has not given anything or changed his condition for the worse.

Further analysis is not needed to show the error in proffered instruction 16, which assumes *as a matter of law* what in any event is question of fact upon the evidence, namely, whether the cause of action in Michigan was the same as that in Chicago. This will depend upon all the circumstances as to some of which we have above surmised.

Suppose the Michigan suit had proceeded to trial and the verdict had been that the "*issues*" were found for the defendant, and judgment on the verdict. This would simply have demonstrated that the *Company* was not *in debt* to Mrs. Marks; it would not have barred her suit against Jacobs for his deceit. How, then, can a mere discontinuance bar her?

A like vice infests proffered instruction 18. It assumes that the cause of action in Michigan and in Chicago were the same, that it was settled and concludes with a peremptory direction to return a verdict for the defendant.

Now, even if the cause of action was the same, yet the special plea calls for more than a *settlement,* it calls for a *satisfaction.* So, too, the common law principle that a release of one of *joint tort feasors* releases the other; calls for more than a *settlement,* it calls for a *release.*

There might indeed be a settlement, and yet not necessarily a release. And still, as we have above shown, defendant received more consideration than he was entitled to in the instructions actually given at his request.

These number 1 to 17, inclusive (omitting numbers 8, 14 and 16).

Of these instructions given it will be seen that No. 17 covers all the elements offered in No. 16 and 18, and presents the same to the fullest extent in defendant's favor. It states that if Mrs. Marks sued the Company in Michigan

to recover the $4,000 involved in "this suit now before you, "and that she made a settlement of this case with the de- "fendant therein, or any one else," then the verdict should be for the defendant.

In spite of this instruction No. 17, the jury found for the plaintiff, thus evidently believing from the "agreement" and what the Supreme Court mentions "the other evi- "dence," that there had been no settlement. Moreover, this instruction No. 17 was erroneous, as even if she settled with the Company it would not release Jacobs.

A settlement is not necessarily a release.

As we show above in

U. S. v. *Haldman*, 91 U. S., 585,

a settlement by agreed judgment is not a release.

Nor anywhere is a *settlement* with one of *joint tort feasors* equal to a settlement with the other. (There must be either actual *satisfaction* or a *release* of the one, in order to be availed of by the other, a mere "settlement" will not do).

This instruction 17, we say, gave the defendant a great deal more than he was entitled to, and yet the jury beat him, and properly so, and under the settled law of Illinois it is not ground for reversal when a jury ignores an erroneous instruction.

McNulta v. *Ensch*, 134 Ill., 46.
W. C. R. Co. v. *Maney*, 170 Ill., 422.

The doctrine invoked by Jacobs is if there be *joint tort feasors* a release of one will release the other; or else again, that any party who has been injured, when obtaining *satisfaction* for such injury, cannot thereafter recover for the same injury from any other party.

Neither of these principles is here applicable.

There is no showing that the corporation and Jacobs *were joint tort feasors,* nor could they be.

A corporation may be held liable by reason of the acts of its representatives, but not because it is acting *jointly with them.* The liability in such a case is upon the doctrine of *respondeat superior;* that is to say, the corporation stands as principal and the representative as agent.

But the corporation, acting *through* its officers, can not be at the same time acting *jointly* with its officers.

There is here no relation of *joint tort feasors,* nor pretended to be.

The next doctrine invoked is that of satisfaction.

But there is no satisfaction.

When Mrs. Marks bought the shares under the false representation of Jacobs, he, Jacobs, became liable to her in damage.

Now we may admit that had she actually sold the shares prior to the trial of the present cause, and had received for the same $2,000, then her damage would not have been so great, and her recovery against Jacobs would have been $2,000 instead of $4,000, and so, had she received $3,000, then her recovery would be only $1,000, and so had she been fortunate enough to sell the shares for $4,000, *and had actually received the money,* then she would have sustained no damage provable at the time of the trial. But suppose she had made an *executory* contract with John Doe, that he would buy her shares for $4,000, and then, before her trial against Jacobs, the said Doe "backed out," shall it be said that she has sustained no damage?

Now we find that she has sued the Company for the amount of $4,000, and as a result of that suit the corpora-

tions enters with her into an "executory" contract under which, if certain things in the future do happen, then the corporation will buy from her her shares. We find, however, that these things did not happen, and the corporation did not buy her shares. By what manner of reasoning can this be said to serve as a satisfaction to her of her loss of $4,000?

It would be a strange doctrine that because Jacobs swindled her and she brought some sort of suit against the corporation into which the money went, which suit she withdrew, receiving not one penny of the money, nor even any binding contract under which she could sue the corporation, that, therefore, she has received satisfaction and thus released Jacobs, himself.

The whole doctrine of releasing one party by release executed to another is obnoxious to our courts and has been frequently so held.

Our courts follow the law as stated by Judge Cooley (to whom we have above referred as the exponent of Michigan law), in his work on Torts, page *139, *et seq.*, that the bar arises not from any particular form that the transaction assumes, but from the "fact that the injured party has *actually* "*received satisfaction.*"

The Supreme Court of Illinois has always held that the *substance* is to be followed and not the form, and hence even where the parties gave actual *releases* and actually state that their claims have been *satisfied*, and even executed instruments *under seal*, yet subsequent litigation is not thereby barred as a matter of law, but the whole question *is left to the jury under proper instructions as one of intent*, and that is to determine whether it was the intent of the parties to release *not only* the person to whom the particular paper

may have been executed, *but also* the person who is subsequently sued.

Our courts have adopted this principle of construction at times, even *against the express language* of instruments under seal. That is to say, they limited such instruments in their efficiency only to that which was intended.

Robinson v. *Stow,* 39 Ill., 568, on page 572, is a strong instance of what we have just said, though not applicable to the particular kind of papers now in question.

City v. *Babcock,* 143 Ill., 358, allows a person to release one (by way of covenant not to sue) without thereby impairing the rights against another *joint tort feasor.* The test being whether the *injury itself had been satisfied. Pages 366 and 367* are particularly apt, and hold that it is a question to be submitted to the jury whether the payment made was intended either to release the other *joint tort feasor,* or to *satisfy the injury itself.*

The following cases of our courts indicate that the expressed language, even in instruments under seal, may be ignored, and the papers not serve as releases, where from all the circumstances it can be seen by the court or jury that the *injury itself was not satisfied* and that the injured party did not intend to release the person who is subsequently sought to be brought into court.

Please consult with reference to the last proposition the following cases:

Parmelle v. *Lawrence,* 44 Ill., 405, particularly page 410.

Moore v. *Stanwood,* 98 Ill., 605, especially 608.

Thomason v. *Clarke,* 31 Ill. App., 404, page 407.

Lumberman v. *Preble,* 50 Ill., 332; please read opinion in full.

The above cases all present instruments under seal, and yet their express language is ignored in order to sustain a recovery against parties who invoke the very principle which now Jacobs invokes, namely, that they shall be released not because they paid anything, not because they gave any consideration, not because they were named in the release, not because equitably they are entitled to a release, nor yet because the injured party has in fact received satisfaction for the injury, but that they should be released simply and solely because of an old and to some extent obsolete and technical doctrine; that the release of one of *joint tort feasors* releases the other.

A doctrine by the way not properly applied as to *joint tort feasors*. It had its origin with joint obligors. A release of one of these would release the other because it deprived the other of *contribution*.

No such principle could exist as to joint wrongdoers, nor should now be considered. As to these even a formal release (but there is none such in our case, simply a "discontinu-"ance" of a litigation), so we say that even a formal release of one would not and should not release the other, as the principle of contribution is not involved.

The only thing which a wrongdoer could use as a defense would be that the injury in question has *actually been satisfied*, and then it could not be by way of defense, but rather by way of diminution or abatement of damages.

Counsel's contention might have some weight if Mrs. Marks had received from the corporation or from any solvent parties an absolute contract under which such party would unconditionally bind himself to buy her stock at $4,000. Counsel's Illinois case might then be applicable.

Or if it had appeared that at the time she tried this pending case against Jacobs that she had then received from

any source $4,000 for her stock, then certainly there could have been no such finding or damages as is here shown, because the sale by her of the stock and the *actual* receipt of the purchase price would have decreased her damage, and so we may admit also that if it had been shown on this trial that she had even a contract with the corporation or any solvent party—nay, indeed, any party, whether solvent or not—under which she could even claim to sell her stock and bring suit if stock be not accepted, that such facts should diminish the amount of damages now recoverable.

But the record fails to show anything of the kind. It simply shows the corporation agreeing that *if* other people paid to it, the corporation, $1,000 by way of stock subscriptions, *then* it, the corporation, would with this $1,000 buy Mrs. Marks' stock.

In other words, there is here not even an executory contract ever to buy her stock, but simply that the corporation will try to find some one else who will buy it.

And the record further shows *that such never came to pass.*

The wildest vagaries of an opium eater would fail to see in this any "satisfaction" of the injury which had been done Mrs. Marks by the deception of Jacobs.

Further it is seen that the other $3,000 should be paid to her by the corporation on the day that the City of Escanaba would turn the property over to the corporation.

This agreement between Mrs. Marks and the corporation was made July 14, 1894.

In this last regard it has reference to the facts shown elsewhere in the record that the City of Escanaba had offered this Company this property in case the Company would there establish its factory.

As the Company failed in December, 1893, it is practically self-evident that the Company would not and could not after July, 1894, succeed in earning the property from the city, and it is shown without contradiction (Rec., 307-308) that almost immediately after this agreement between Mrs. Marks and the Company, the Company itself, through its president, declares her stock worthless, and declares she will never get a cent for it.

Under these circumstances it was clearly a matter of fact, and not of law, whether under any theory Jacobs could claim the release by peremptory instruction upon the ground either that Mrs. Marks had released the corporation or received satisfaction from it.

If anything had been paid by the Michigan corporation to Mrs. Marks by way of consideration, not only in behalf of the corporation, but *also in behalf of Jacobs*—that is to say, if Jacobs was either actually or by intendment *embraced in the consideration*, which Mrs. Marks received (had she received any at all)—then such fact might be considered by the jury upon the proposition that he should also be embraced in the release which the corporation had obtained (had it in fact been released, which it had not).

No case is cited by counsel with facts similar to those here involved, and hence counsel's citations may well be distinguished. But even if they be held as announcing a rule in favor of Jacobs, they must then be considered *simply as in conflict with the Illinois citations by us presented.*

A brief review, however, of counsel's citations may be of interest, even if not of importance.

Their sole case from Illinois, *Simmons* v. *Clark,* 56 Ill., 96, shows that in case certain payments should be made in the future, then one of the parties claimed to be liable should

be released, and it was found that such payment was never made, *and hence that neither that party nor any other was in fact released.*

And so we may say in the case at bar that if the Michigan corporation had ever bought Mrs. Marks' stock for the $1,000 and later for the $3,000, thus a total of $4,000, why, of course, she would have no further action against anyone, because that in fact would wipe out her damage by restoring to her her money. But as the corporation never actually bought, nor indeed obligated itself to buy, but simply said that if certain contingencies should arise, that then it would buy, the matter rests precisely on the same basis as in the *Simmons* case.

Leddy v. *Barney*, 139 Mass., 397, shows that Barney was a superintendent employed by Chace. Barney's neglect injured the plaintiff. The plaintiff made a demand upon Chace and received $150 from Chace in settlement *of the injury*. This was held to be a release of plaintiff's cause of action against Barney.

So far as in the opinion general propositions of law are announced, the case is clearly repugnant to the Illinois authorities.

So far as the *facts* are concerned, the case is clearly distinguishable. The case rests upon

Brown v. *Cambridge*, 3 Allen, 474,

from which on page 476, as also from the reading of both of these cases together, it is learned that the defendant, claiming a release because of some other party being released, must prove the *identity* of the cause of action, and again, must show that there was some *connection* between the person actually released and the person who afterwards claims the benefit of such release.

Thus as where (in the *Leddy* case, *supra*), Chace, the employer, being released it sufficed to release Barney, the employee. The court, in fact, on page 476 of the 3rd Allen, cites with approval the doctrine found in other cases that a "*stranger to the tort*" *can not* claim a release because of the release of some other party.

And, indeed, it would be singular if we should find our property destroyed, and have reason to believe that John Doe was the culprit, and in a suit against him he should conclusively prove an *alibi*, and have a judgment of not guilty, or if, indeed, without going to judgment, we should execute to him a release (having the effect of a judgment in his favor) or we should simply dismiss the suit, that this would bar our right to bring an action against Richard Roe, as to whom we may possess sufficient evidence as to guilt. The authorities have never so held, and we undertake to say that they never will.

Counsel themselves invoke the case of *U. S. v. Parker*, 120 U. S., 89, (to which we refer above) and which, near the end of the opinion, says that the proceedings in that litigation amounted to a finding that the plaintiff had "no cause of action."

That case involved no third person; it was simply an attempt to sue Parker over again after once suing him.

Now, admit that in our case the prior record shows that Mrs. Mar'ks has *no cause of action* against the *corporation*. This is by no means a holding that she has no cause of action against *Jacobs*, no more than in our above illustration as to our ancient friends Doe and Roe.

The record utterly fails to show any "joint" conduct on the part of Jacobs and the corporation.

It fails to show that Jacobs, at the time of his fraudulent

representations, was either a member or an officer of the corporation. It fails to show that *the corporation* at that time either by Jacobs or at the hands or mouth of another person acted or attempted to act with, or in any manner participated in the false representations. It fails to show that the *corporation* ever authorized Jacobs to utter for it any falsehood.

If Mrs. Marks actually had, or thought she had any right of action against the corporation for the $4,000, which she put into the corporation, induced by the deceptive representations of Jacobs, it would follow that said cause of action, as far as this abstract shows, was not and could not have been because of any *joint act* on the part of Jacobs and the corporation.

In the *Leddy* case, *supra*, Barney was the employe of Chace and acted in the "scope" of his duty; now, even admitting that Jacobs was already a member—even an officer—of the company, we know of no principle which says that he is in the "scope of his duty" when he deceives plaintiff into becoming a co-member with him.

The only remaining principle on which counsel could contend is the one which we freely concede, and we want no better discussion than is given by counsel in *Lovejoy* v. *Murray*, 3 Wall., 1, which we beg your Honors to read in full.

The United State Supreme Court there reviews the authorities, and there decides that a judgment even against one of actual joint tortfeasors *does not release* the others until the *judgment is actually paid, and that too in full.* The court uses the particular expression that the payment must be "*in full.*" (Page 17.)

In other words there must be actual satisfaction for the *injury* itself.

Whether there has been actual satisfaction is for the jury.

Hart v. *Baller*, 15 Sargent & R., 162.

There must be not only accord but actual satisfaction.

Campbell v. *Hurd*, 32 N. Y. Supplement, 377 affirmed 49 N. E., 1104; please read in full. There the costs of litigation were paid by the defendant.

Simmons v. *Clark*, 56 Ill., 96.

And it must be fully *executed*.

Frost v. *Johnson*, 8 Ohio, 395.

Smith v. *Crawford*, 32 N. Y. Supp., 377.

Simmons v. *Clark*, 56 Ill., 96.

transpose

It is apparent that when Mrs. Marks agreed with the corporation to dismiss her suit, and the corporation to dismiss its suit, that neither was given any satisfaction for anything to the other, and then when it was further agreed that the corporation would pay her $4,000, and take her stock, that, and that only, was, or might have been actual satisfaction for the $4,000 which she had lost. But it could be actual satisfaction only in one of two ways, either by her actually receiving $4,000, or else by her receiving a contract entitling her to demand $4,000, and if not paid to bring suit and obtain judgment against the corporation for $4,000. It certainly can not be deemed *actual satisfaction* that the corporation entered with her into a mere tentative contingent executory agreement, that it, the corporation, might find some other person who might put $1,000 into the corporation. In the absence of finding such person the agreement must simply prove in the end altogether nugatory, and even so as to the remaining payment of $3,000, which also would never ripen into a liability unless the corporation received its title deeds clear from the city.

Indeed, even if the corporation had received such titles from the city, it would not have to pay the $3,000 at all

unless it also had found the party ready to put in the $1,000 provided for.

The simple statement of this matter is complete refutation that there ever was any satisfaction for the *injury* in question. The company never found the purchaser for $1,000 of stock, never got title to its property, never paid her a penny, *never released* her from her liability as a stockholder, *could not do so* even if it tried, as such release must come from the *creditors* (that there were such is shown, pages 157-159 of the record); the record, as we remember it, does not even show that the company discontinued its damage suit against her, but supposing it did, it *can commence another*. Surely under these circumstances the "settlement" and the "satisfaction" are hollow mockeries. Please read hereon the opinion of the State Supreme Court.

Livingston v. *Bishop*, 1 Johns., 290, cited by counsel, is also in its facts widely different from the case at bar. In that a master accompanied by his five servants, *all six acting together*, committed a trespass. Judgment being obtained against the master it was held that *until actually paid* it was not a bar to a suit against the servants.

Gunther v. *Lee*, 45 Md., 60, was against three defendants *who acted jointly* in tearing down plaintiff's house; plaintiffs released one, and the court quotes from the release, that plaintiffs for the $500, acknowledged themselves "to "be *fully paid* and *satisfied* for all and singular the tres- "passes complained of"; hence the court concludes there was actual satisfaction in full. (The court also says that the same would be implied, as a matter of law, from an instrument under seal. In this expression the court conflicts with our Illinois cases.)

Brown v. *Marsh*, 7 Vermont, 320, cited by counsel, was a case in which Temple and Marsh were *charged with con-*

spiracy (*i. e.*, with a *joint* act). Plaintiff desiring to use Temple as a witness, gave him a release so as to remove the objection of being interested. It is held that Marsh could avail himself of the release.

The case might be somewhat in point in fact (though contrary in principle to our citations), had Mrs. Marks sued or claimed against *Neufeld* (Jacob's associate in the fraud) and Jacobs as joint actors, and then released Neufeld It will be remembered that there is nothing to show that she ever sued or claimed against the *corporation* and Jacobs as joint actors.

Hopkinson v. *Shelton*, 37 Ala., 311, was trover by Hopkinson against Shelton (a Sheriff); the court finds that the same subject-matter had been adjudicated in a prior litigation by the same Hopkinson (and another as plaintiffs) against the same Sheriff.

The case might be near ours had Mrs. Marks ever sued Jacobs (together with the corporation) and reached an adjudication and later sought to sue Jacobs alone.

Respectfully submitted.

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